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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 426

INTERCOUNTY OPERATING CORPORATION AND SALONGA FARMS, INC.,

Petitioners,

vs.

COUNTY OF NASSAU

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

MORRIS ROCHMAN,
Counsel for Petitioners.

CHARLES H. STOLL,
Of Counsel.

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No. 426

INTERCOUNTY OPERATING CORPORATION AND SALONGA FARMS, INC.,

Petitioners,

vs.

COUNTY OF NASSAU

PETITION FOR A WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, above named, respectfully show:

This is a petition for a writ of certiorari to review a final decision made June 14, 1945, by the Court of Appeals, the last resort of all causes of the State of New York, affirming, without opinion, an order of the Appellate Division of the Supreme Court, Second Department, which order modified, and as modified, affirmed the order of the County Court of the County of Nassau granting the motion of the plaintiff for summary judgment, and the judgment entered thereon.

1. Summary Statement

This action to establish the regularity of a sale for unpaid taxes and to clear title under the Treasurer's deeds issued thereon was brought pursuant to the Nassau County Administrative Code (Chapter 272, Laws of New York, 1939), hereinafter referred to as the "Code", as amended by Chapters 562 and 679, Laws of New York, 1941 hereinafter referred to as the "Code Amendments". Pertinent provisions are set out in the Appendix hereto.

Your Petitioners, at sales held on July 14th, 1939, and again on July 10th, 1940, purchased from the County Treasurer, pursuant to the provisions of the Code, certificates of sale of the lien of the County for unpaid taxes, assessed and levied for the tax year 1938-39 and the tax year 1939-40, investing therein approximately $250,000.00. Under the Code,

(1) Petitioners could not obtain a conveyance of the premises described in their tax sale certificates before the expiration of 4 years from the date of the sale, within which period the owner or other person having a lien on said premises could redeem from such sale to the Petitioners (Secs. 5-50.0 and 5-51.0, Appendix, Pages 30, 21).

(2) After 4 years from each such tax sale, Petitioners would become entitled to the amounts paid for such certificates, plus interest, penalties and costs (Sec. 5-48.0, Appendix, Page 30).

(3) If after the expiration of the period of 4 years, no redemption had been made, Petitioners would become entitled to possession of the real estate affected by the tax lien and to a conveyance thereof which "shall vest in the grantee an absolute estate in fee, subject to all claims which the County may have thereon for tax

or other liens or encumbrances'' (Secs. 5-52.0 and 5-53.0, Appendix, Page 32).

Thereafter, and pursuant to the Code Amendments, subsequently enacted (effective April 19th and 22nd, 1941), the County of Nassau, Respondent, in July of 1941, purchased subsequently accruing tax liens covering the properties affected by the liens theretofore sold to the Petitioners. Under the Code Amendments,

(1) the time allowed for redemption from a sale thereunder, by the owner or any other person having a lien on the premises was reduced to 2 years, instead of the 4 years under the Code.

(2) the new purchaser thereby would become entitled to a deed at a time before a purchaser at a prior sale of the same property, if any (as is the case involving the Petitioners), could exercise his right to acquire a deed.

(3) However, the rights of prior purchasers at sales held before the effective date of the Code Amendments which affect the same property subsequently sold were to continue as if the Code Amendments had not been enacted (Chapter 679, Laws 1941, Appendix, Pages 25 to 28.)

Promptly within two years after the sale to the County and before the Petitioners could become entitled to a conveyance of the premises under the Code, and no redemption by the owner having been made, the County gave notice calling upon Petitioners to redeem, under the Code Amendments, from such sale to the County. By said notice the County required the Petitioners to pay the amounts paid by the County for its certificates, plus interest, penalties and costs, on threat of having their rights under their tax sale

certificates extinguished, by the County obtaining from the County Treasurer, deeds running to the County, respecting the properties described in the certificates held by Petitioners.

Petitioners resisted the demand thus made upon them on the ground that the assumption of such additional burden prior to their right to a deed was not contemplated by the terms of their contract, that their rights under their contracts were specifically saved by a provision of the Code Amendments, and that, as sought to be construed and applied by the County, as tax sale purchaser, the Code Amendments abrogated the contractual rights of the Petitioners in violation of the federal Constitution.

Seeking a declaration of the rights of the parties concerned Petitioners thereupon brought an action in the Supreme Court of the State of New York for a declaratory judgment and for a construction of the statutes involved. The County, as defendant in that action (*Intercounty Operating Corporation and Salonga Farms, Inc.* v. *The County of Nassau*), moved for a dismissal of the complaint upon the ground that there being no present or justiciable controversy, the complaint failed to state a cause of action for the remedy of a declaratory judgment. Petitioners' complaint in said action was dismissed at Special Term (181 Misc. (N. Y.) 390), and the dismissal was affirmed by the Appellate Division (267 A. D. (N. Y.) 957), granting leave, however, for an appeal to the Court of Appeals. The Court of Appeals affirmed, without opinion (293 N.Y. 688). A petition for a writ of certiorari to this Court was denied (October Term, 1944, Docket No. 443).

While the above litigation was in progress, the County, Respondent, applied for and obtained from the County Treasurer, a series of deeds of the properties affected by its certificates, and recorded the same.

The County, Respondent, then brought this action in the County Court of Nassau County to clear title under its deeds. Petitioners duly defended and set up as and for a separate and distinct defense that Section 6 of Chapter 679, Laws of New York, 1941 (Appendix Page 28), specifically saved the rights of the Petitioners for the enforcement of their tax sale certificates, as provided by the Code prior to the Code Amendments (R. 16), and that the Code Amendments, insofar as they be permitted to infringe upon any of the rights acquired by the petitioners or to impose additional burdens not existing at the time of the purchase of their tax liens, are void and unconstitutional and within the prohibition of the federal Constitution, as impairments of their contracts with the County Treasurer (R. 17). Respondent moved to strike out the answer and said motion was granted. Judgment was thereupon entered, decreeing that the Respondent, County, is the lawful owner of the premises described in its deeds, and barring your Petitioners from any claim, lien or encumbrance upon the said property (R. 4 to 5).

On appeal from said judgment to the Appellate Division, your Petitioners urged and in their brief argued that the failure to preserve their liens by giving effect to Section 6 of the Code Amendments was repugnant to the federal Constitution as impairing the obligation of their contracts. The order and judgment were affirmed by the Appellate Division, after modification as to costs, one justice dissenting, however, and voting for reversal, on the ground that Petitioners held a prior lien, granting a right to conveyance which was preserved by the saving clause in the amendatory statute (R. 24).

The federal question was also argued in the Court of Appeals, which Court again affirmed without opinion. By order dated July 19, 1945, the Court of Appeals denied your Petitioners' motion to recall and amend the Remit-

titur for the purpose of showing that questions under the Constitution of the United States had been presented and necessarily passed upon by the Court of Appeals in its determination of this case.

The order of the Court of Appeals in this cause was a final determination of a present, justiciable controversy. It is from this decision which construes subsequent legislation so as to impair substantial rights under subsisting contracts that Petitioners come praying for a Writ of Certiorari.

2. Jurisdiction

The date of the decision of the Court of Appeals of the State of New York of which review is here sought, is June 14th, 1945 (R. 25) and the final decree of that Court was filed June 29, 1945 (R. 25).

The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 (b) of the Judicial Code, as amended by the Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. 54, 28 U. S. C. A. Section 344 (b).

There are here involved Laws of New York, 1939, Chapter 272 and amendments thereto by Laws of New York, 1941, Chapters 562 and 679, and the Court of Appeals of the State of New York by its construction and application of the later enactments has decided against Petitioners' rights thereunder so as to produce an impairment of Petitioners' contracts repugnant to Article 1, Section 10, of the Constitution of the United States. The pertinent provisions of the statutes involved are set forth at length in the Appendix hereto, pages 24 to 34.

The federal question was raised by the pleadings (R. 16 to 18, and was stressed in the briefs and on the arguments in all courts. The decision of the Court of Appeals could not have been rendered without deciding the consti-

tutional questions thus raised by Petitioners and argued before that Court.

The following cases are believed to sustain the jurisdiction of the Supreme Court of the United States.

Detroit United Ry. v. *Detroit*, 242 U. S. 238;
Milsaps College v. *City of Jackson*, 275 U. S. 129;
Columbia Water Power Co. v. *Columbia Electric St. R. etc. Co.*, 172 U. S. 475;
McCullough v. *Virginia*, 172 U. S. 102, 116, 119.

3. Reasons for Issuance of Writ

The determination of the Court of Appeals of the State of New York, by affirming without opinion the order of the County Court, has decided an important question of law affecting the property and vested property rights of your Petitioners and has thereby created a rule of law repugnant to and violative of the applicable provisions of the Constitution of the United States and is contrary to decisions of this Honorable Court, in the manner following:

1. It amounts to a deprivation of rights under a contract solemnly authorized by a prior act of the State Legislature in contravention of the expressed intent contained in a subsequent act of the said Legislature to save and preserve those rights previously created.

2. It not only impairs, in the ordinary sense, but, in its application, completely and arbitrarily extinguishes previously created and subsisting contractual rights of great solemnity, in order to give effect to rights subsequently created.

3. It deprives the Petitioners of equal protection under the law by granting to the Respondent, County of Nassau, and denying to the Petitioners the relief which ought and should operate in favor of the latter, the same having been

preserved to the Petitioners by the express provision of the amendatory act.

4. It declares a rule of law producing by an unnecessarily harsh and oppressive application of subsequent legislation, substantial impairment of contracts, aggregating in value upwards of $250,000.00 which were solemnly entered into on the faith of prior valid legislative authority and sanction.

5. It declares a rule of law contrary to the decisions of the Supremee Court of the United States, without indulging in an expression, by affirming without opinion, of the basis upon which such rule is predicated, thereby creating doubt and confusion as to its soundness in purview of the federal constitutional prohibition.

6. Insofar as the decision of the State Court interprets subsequent legislation so as to impair rights under existing contracts, it is not in accord with the decisions of this Court in the following cases among others:

Wood v. *Lovett*, 313 U. S. 362;
Columbia College v. *City of Jackson*, 275 U. S. 129;
Bradley v. *Lightcap*, 95 U. S. 1;
Walker v. *Whitehead*, 83 U. S. 357.

WHEREFORE, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of New York, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and of the proceedings of the said Court of Appeals, and that the order and judgment of the Court of Appeals of the State of New York be reversed

by this Honorable Court, and that your Petitioners have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Dated, New York, September 14, 1945.

INTERCOUNTY OPERATING CORPORATION,
and
SALONGA FARMS, INC.,
Petitioners,

By MORRIS ROCHMAN,
Counsel for Petitioners.

CHARLES H. STOLL,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

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BRIEF IN SUPPORT OF PETITION

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1. Opinions of the Courts Below

No opinion was rendered in this cause by the County Court of the County of Nassau in granting summary judgment on the pleadings herein, but an opinion (not officially reported) thereafter rendered in connection with a companion case and therein by specific reference made applicable to this cause, is found on pages 38 to 41 of the record in the case of "Grace E. Connolly, Plaintiff-Respondent, against Timothy Curry, et al., etc., Defendants, and Intercounty Operating Corporation, Petitioners (Defendant-Appellant below)," docketed in this Court at the October Term, 1945, as No. 427 and simultaneously herewith

brought up for review by this Court, on a petition for a writ of certiorari. The memoranda of the Appellate Division for the Second Judicial Department, modifying the judgment as to costs and as so modified, affirming the judgment of the Court below, is found on pages 23 to 24 of the record and is officially reported in 268 A. D. (N. Y.) 1067. No opinion was rendered by the Court of Appeals in affirming the judgment of the Appellate Division.

2. Jurisdiction and Statement of the Case

The jurisdictional basis for the petition and the statement of the case are found in the petition, and for the sake of brevity are not repeated here.

3. The Questions Presented

1. Did the 1939 and 1940 purchases of tax liens from the County Treasurer result in contracts with Petitioners upon terms as expressed in the Code?

2. Did the construction and application of the subsequent Code amendments by the State Court of Appeals substantially impair the obligation of Petitioner's contracts?

3. Did the State Legislature in enacting Section 6 of the Laws of New York, 1941, Chapter 679, expressly save and preserve Petitioners' rights under the prior contracts?

4. ARGUMENT (as to Jurisdiction)

POINT A

This Court's denial of a writ of certiorari in the prior action which was brought for a declaratory judgment does not foreclose a consideration of the petition herein, which brings up for review the final determination of the Court of last resort of the State affecting a present justiciable controversy between the parties.

Any one of the compelling considerations enumerated by this Court in *Alabama State Federation of Labor* v. *McAdory*, decided June 11th, 1945, and reported —— U. S. ——, 65 S. Ct. 1384, 1389, 1390, might well have impelled this Court to delay passing upon the constitutionality of the state statute here involved. As is there said: "A law which is constitutional as applied in one manner, may, it is true, violate the Constitution when applied in another." The Court is now presented with a case "involving particular provisions as specifically applied to persons who claim to be injured."

POINT B

The jurisdiction of this Court on a petition for a writ of certiorari is not affected by failure of the State Court to write an opinion, nor by its refusal to certify that questions under the Constitution of the United States had been presented and necessarily passed upon in its determination.

Were the rule otherwise, the State Court could in every case, prevent a review of its own determinations and contravene the remedial purposes of the Judicial Code. While an opinion stating that a state statute was drawn in question is generally sufficient, when consistent with the record, to sustain the jurisdiction of this Court on a direct appeal under 237 (a) of the Judicial Code, jurisdiction to consider the merits under 237 (b) of the Judicial Code is conferred upon this Court, on a petition for a writ of certiorari, where the record shows that appellants have properly and seasonably raised the federal question (*Charlestown Federal S. & L. Assn.* v. *Alderson*, —— U. S. —— 65 S. Ct. 624).

The federal question was here raised by the pleadings (R. 16 to 18) where it was contended that as sought to be applied the Statute was invalid as repugnant to the federal Constitution.

5. ARGUMENT (as to the Merits)

POINT I

The 1939 and 1940 purchases of tax liens from the county treasurer resulted in contracts with petitioners upon terms as expressed in the code.

This Court has held that a taxing statute "• • • taken in connection with the other statutes regulating the acquirement by the State, and the disposition by it, of lands sold for delinquent taxes, constituted, in effect an offer by the State, to those who might become purchasers of such lands; and the protection it afforded to the title acquired by such purchasers necessarily inured to every person acting under it and constituted a contract with him," (*Wood* v. *Lovett,* 313 U. S. 362, 369), and also that "The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms," (*Von Hoffman* v. *Quincy,* 4 Wall. (U. S.) 535, 550; *Home Building & Loan Asso.* v. *Blaisdell,* 290 U. S. 398, 429).

Hence, as provided by the Code, the Petitioners, upon payment of the purchase price, became vested with the following substantial contract rights:

(1) A right to receive a tax sale certificate describing the property sold for delinquent taxes (Sec. 5-41.0);

(2) A right, after 4 years, to receive the amount paid for the tax sale certificate, plus interest, penalties and costs (Sec. 5-48.0);

(3) A right, to be exercised at their own option, to pay subsequently accruing taxes, and add the amounts so paid to their liens at the same rates of interest, penalties and costs (Sec. 5-49.0);

(4) A right, after 4 years, if the lien was not satisfied by the owner within that time, to a conveyance of the property, which conveyance shall vest in the grantee an absolute estate in fee, subject to the claims of the County for taxes or other liens (Sec. 5-53.0); or to an action in foreclosure, (Sec. 5-60.0), and to a conveyance made pursuant to judgment in such action (Sec. 5-64.0).

Point II

The construction and application of the subsequent code amendments by the State Court of Appeals, substantially impaired, and to all intents and purposes, actually extinguished the obligations of the county treasurer on the one hand and the rights of the petitioners under their contracts on the other.

Article I, Section 10, of the United States Constitution provides that "no State shall * * * pass any * * * Law impairing the Obligations of Contracts."

While there is no absolute freedom of contract and while there may be no objection to legislation restricting the power to make contracts in the future (*Chicago, Burlington & Quincy R. Co.* v. *McGuire,* 219 U. S. 549, 567, 31 S. Ct. 259, 55 L. Ed. 328; *Muller* v. *State of Oregon,* 208 U. S. 412, 421, 28 S. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957) or modifying contracts previously made, as long as substantive rights are substantially preserved (*Home Bldg. & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 55 S. Ct. 854, 79 L. Ed. 1593, 97 A. L. R. 1106), any statute which substantially modifies vital terms of a contract already in force destroys and impairs the contract obligation and violates the constitutional provision. That is what the Constitution seeks to prevent, and the courts, including the Supreme Court of the United States, have always opposed such state action, (*Sturges*

v. *Crowninshield,* 4 Wheat. 122, 17 U. S. 122, 4 L. Ed. 529; *Ogden* v. *Saunders,* 12 Wheat. 213, 25 U. S. 213, 6 L. Ed. 606; *Bronston* v. *Kinzie et al.,* 1 How. 311, 42 U. S. 311, 11 L. Ed. 143; *State of Louisiana* v. *Mayor of City of New Orleans,* 109 U. S. 285, 3 S. Ct. 211, 27 L. Ed. 936; *Nelson* v. *Police Jury of St. Martin's Parish,* 111 U. S. 716, 4 S. Ct. 648, 28 L. Ed. 574).

Nothing in *Home Bldg. & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 54 S. Ct., 231, 78 L. Ed. 413, 88 A. L. R. 1481, or in any other case changes this settled principle. In the *Blaisdell* case, for instance, there was no attempt to impair substantial rights or obligations and the court itself expressly wrote that the "integrity of the mortgage indebtedness is not impaired" (page 445 of 290 U. S., page 242 of 54 S. Ct., 78 L. Ed. 413, 88 A. L. R. 1481).

Following the Blaisdell decision, the Supreme Court was called upon to treat other legislation which involved the prohibition against impairing contract obligations. In none of them did the court construe or apply a statute in such a manner as the one now being considered (*W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, 54 S. Ct. 816, 78 L. Ed. 1344, 93 A. L. R. 173; *W. B. Worthen Co. ex rel. Board of Com'rs of Street Imp. Dist. No. 513 of Little Rock, Ark.* v. *Kavanaugh,* 295 U. S. 56, 55 S. Ct. 555, 79 L. Ed. 1298, 97 A. L. R. 905; *Treigle* v. *Acme Homestead Ass'n,* 297 U. S. 189, 56 S. Ct. 408, 80 L. Ed. 575, 101 A. L. R. 1284; *State of Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95, 58 S. Ct. 443, 82 L. Ed. 685, 113 A. L. R. 1482; *Wood* v. *Lovett,* 313 U. S. 362, 61 S. Ct. 983, 85 L. Ed. 1404; *Veix* v. *Sixth Ward Bldg. & Loan Ass'n,* 310 U. S. 32, 60 S. Ct., 792, 84 L. Ed. 1061; *Gelfert* v. *National City Bank,* 313 U. S. 221, 61 S. Ct. 898, 85 L. Ed. 1299, 133 A. L. R. 1467).

In *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, 54 S. Ct. 816, 78 L. Ed. 1344, 93 A. L. R. 173, an Arkansas statute

exempted the proceeds of life insurance policies from attachment or other process. Holding the Statute unconstitutional so far as it applied to rights acquired before the statute's enactment, the Court said (page 431 of 292 U. S., page 818 of 54 S. Ct., 78 L. Ed. 1344, 93 A. L. R. 173): "Such an exemption, applied in the case of debts owing before the exemption was created by the Legislature, constitutes an unwarrantable interference with the obligation of contracts in violation of the constitutional provision." After referring to the *Blaisdell* case, the court went on (page 433 of 292 U. S., page 818 of 54 S. Ct., 78 L. Ed. 1344, 93 A. L. R. 173): "But we also held that this essential reserved power of the State must be construed in harmony with the fair intent of the constitutional limitations, and that this principle precluded a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them."

In *W. B. Worthen Co. ex rel. Board of Com'rs of Street Imp. Dist. No. 513 of Little Rock, Ark.*, v. *Kavanaugh*, 295 U. S. 56, page 60, 55 S. Ct. 555, 556, 79 L. Ed. 1298, 97 A. L. R. 905, the court held unconstitutional a statute which diminished rights of creditors: "To know the obligation of a contract we look to the laws in force at its making. * * * In the books there is much talk about distinctions between changes of the substance of the contract and changes of remedy. * * * The dividing line is at times obscure. There is no need for the purposes of this case to plot it on the legal map. Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected. * * * We state the outermost limits only. In stating them we do not exclude the possi-

bility that the bounds are even narrower. The case does not call for definition more precise."

An examination of these and the other cases indicates that there is no hard and fast rule and no invariable yardstick for reaching a decision; the distinction is often "a matter of degree" (*Martin* v. *District of Columbia*, 205 U. S. 135, 139, 27 S. Ct. 440, 51 L. Ed. 743; *Block* v. *Hirsh*, 256 U. S. 135, 156, 41 S. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165). "The reasonableness of each regulation depends upon the relevant facts" (*Nebbia* v. *New York*, 291 U. S. 502, 525, 54 S. Ct. 505, 511, 78 L. Ed. 940, 89 A. L. R. 1469). The cases dealing with the mortgage moratorium laws are illustrative. They have been sustained when it appeared that they deprived the mortgagees only of a "chance to get more than the amount of their contracts" (*Gelfert* v. *National City Bank*, 313 U. S. 221, 233-235, 61 S. Ct. 898, 903, 85 L. Ed. 1299, 133 A. L. R. 1467), or when "they were found to preserve substantially the right of the mortgagee to obtain • • • payment of the indebtedness" (*Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 581, 55 S. Ct. 854, 859, 79 L. Ed. 1593, 97 A. L. R. 1106; *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481). They have been stricken down "when it appeared that this substantive right was substantially abridged" (*Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 581, 55 S. Ct. 854, 859, 79 L. Ed. 1593, 97 A. L. R. 1106; *W. B. Worthen Co. ex rel.* v. *Board of Com'rs of Street Imp. Dist. No. 513 of Little Rock, Ark.* v. *Kavanaugh*, 295 U. S. 56, 55 S. Ct. 555, 79 L. Ed. 1298, 97 A. L. R. 905).

The substantive rights of the Petitioners were by the determination of the State Court of Appeals substantially abridged and preservation of their rights to obtain payment of the indebtedness evidenced by their tax sale certificates

was denied and the obligation completely extinguished, in the manner following:

(1) They were deprived of their right, after 4 years, to receive the amount paid for the tax sale certificate plus interest, penalties and costs.

(2) They were denied the option of paying for subsequently accruing taxes which they could add to their liens and receive in return the amounts paid plus interest, penalties and costs, but, instead, were required to pay to the County, the subsequent purchaser, the amounts paid by it, plus interest, penalties and costs, a burden not contemplated by their contracts.

(3) They were required to make these substantial expenditures at a time well in advance of their right to acquire a conveyance of the premises pursuant to their tax sale contracts and prior to their right to commence an action to foreclose their tax liens.

(4) The penalty for their refusal to accept this unwarranted modification and abridgment of their substantive rights has resulted in the complete destruction of their contracts and the repudiation and extinguishment of the debt evidenced thereby.

Point III

The State Legislature, in enacting Section 6 of the Laws of New York, 1941, Chapter 679, expressly saved and preserved petitioners' rights under their contracts.

The State Legislature, being mindful of the possibility that the Code Amendments might, in certain cases, produce the harsh, oppressive and unconscionable result as is here demonstrated, had deliberately inserted Section 6 thereof, in order to give them a completely prospective operation; save them from abridging in any way the contract rights vested in a purchaser of a tax lien sold at a sale of tax liens held prior to the first day of April, 1941, and thereby pro-

tect the Code Amendments from condemnation under the federal Constitution. On no other basis can the inclusion of Section 6 in the Code Amendments be logically supported.

The determination by the State Court of Appeals construes and applies the Code Amendments as if they did not contain Section 6, which reads as follows:

> "§ 6. All rights and remedies provided for the enforcement of tax liens and the redemption of real property affected by a tax lien sold at a sale of tax liens held prior to the first day of April, nineteen hundred forty-one, shall continue in respect of such tax liens and such real property in the same manner as though this chapter had not been enacted."

In his dissenting memorandum for the Appellate Division, Adel, J., said (R. 24):

> "Appellants' right to conveyances, or foreclosure and sale, in the alternative, was preserved by section 6, chapter 679, of the Laws of 1941. * * * In my opinion it is plain that priority of Appellants' lien is to be preserved. * * * and that the rights which were given to the plaintiff under the judgment on appeal should operate in favor of appellants against the respondent."

Such a construction of the Code Amendments would give them the prospective application expressly intended by the legislature. Even where the intention is in doubt, an impartial and fair application should be given to the general rule against giving retroactive operation to statutes, which, therefore, are to be construed entirely prospective unless the legislative intent to do otherwise is expressly and distinctly declared (*Harvey* v. *Tyler*, 2 Wall. (U. S.) 328; *Fullerton Kreuger Co.* v. *Northern Pacific*, 266 U. S. 435, 437; *Schwab* v. *Doyle*, 258 U. S. 529, 534; *Trustees of Union College*, 129 N. Y. 308; *Matter of Miller*, 110 N. Y. 216; *N. Y. & O. R. R. Co.* v. *Van Horn*, 57 N. Y. 473, 477).

Point IV

The code amendments can and should be construed so as to effectuate the legislative intent, avoid the unjust and oppressive consequences which result from the determination of the State Court and thus bring them in harmony with the Federal Constitution.

Where there are two possible constructions of a statute, that one will be preferred which is liberal in favor of the citizen rather than the State, and which does not produce unfair, arbitrary or oppressive results. This Court has held that: "Taxation is an intensely practical matter, and laws in respect of it should be construed and applied with a view of avoiding, as far as possible, unjust and oppressive consequences" (*Farmers L. & T. Co.* v. *Minnesota*, 280 U. S. 204, 212; *Burnett* v. *Niagara Falls Brewing Co.*, 282 U. S. 648, 654).

The obligations of the contracts here involved are substantial, aggregating in value upwards of $250,000.00. The determination of the State Court of Appeals has resulted in a destruction of the contracts, and a complete repudiation of the debt. Such a harsh and unjust result could not have been intended by the Legislature.

Full and fair effect can be given to the provisions of the Code Amendments and an unconstitutional meaning can be avoided by adopting a construction consonant with the reasoning that the Legislature by inserting Section 6 of Chapter 679 of Laws of New York 1941 intended to give the Code Amendments wholly prospective application as to sales of tax liens held prior to April 1, 1941. So construed they would not produce the unjust and oppressive result complained of, and would be in harmony with the federal Constitution. This Court has the power so to construe them (*Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304, 313), and it is its duty to do so (*Porter* v. *Investors Syndicate*,

286 U. S. 461, 470; *Bratton* v. *Chandler*, 260 U. S. 110, 114; 16 Corpus Juris Sec., Constitutional Law, Section 98).

In this cause in which a subdivision of the state government is directly involved as a party plaintiff, no opinion was written and no consideration to the constitutional issue directly presented by the pleadings was given by the court of first instance. (This case was alluded to in an opinion written in connection with a subsequent action, referred to on page 1 of this brief, and now before this Court, as a companion case, wherein the basis for the Court's determination is, in effect, put upon the ground that the Court is confronted with a *fait accompli* because of the existence of the deeds running to the Plaintiff.)

On appeal to the Appellate Division, the memorandum written for modification and affirmance relates only to the question of costs. In the memorandum of dissent by that Court, however, the constitutional question, though not expressed, is clearly implicit, for there the question squarely placed before the Court of Appeals is that of the legislative intent, as expressed in its subsequent enactment, that Petitioners' contract rights acquired under prior legislation be preserved.

On the appeal herein involving a present, justiciable controversy, the State Court of last resort, by its affirmance, without opinion, leaves that question wholly unanswered. It is significant that the constitutional question had previously been left unanswered in the action brought by the present petitioners for a declaratory judgment and for an authoritative construction of the statutes here involved (*Intercounty Operating Corporation and Salonga Farms, Inc.* v. *The County of Nassau*, 293 N. Y. 688).

It is sincerely and earnestly urged that by its failure to write an opinion stating the basis upon which its determination is predicated the State Court of Appeals has created confusion and doubt as to the efficacy of decisions of this

Court to the contrary, in analogous situations and has weakened the protective influence of the federal Constitution. Although on this application for a review of its determination there is no desire to question the motives of the State Court for its silence on a controversial constitutional question, it may be felt that such silence may have been induced by the conflict of interests in an anomalous situation involving a subdivision of the state government. An authoritative expression upon a review of the constitutional issues herein involved is therefore all the more necessary.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its Appellate Jurisdiction and that to such end a writ of certiorari should issue.

Respectfully,

MORRIS ROCHMAN,
Counsel for Petitioners.

CHARLES H. STOLL,
Of Counsel.

APPENDIX

Laws of New York, 1941

Chapter 562

An Act to amend the Nassau county administrative code in relation to the time when the receiver of taxes shall make his return of unpaid taxes to the county treasurer

Became a law April 19, 1941, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

L. 1939, ch. 272, § 5-23.0, subd. a, amended.

Section 1. Subdivision a of section 5-23.0 of chapter two hundred and seventy-two of the laws of nineteen hundred thirty-nine, entitled "An act to provide an administrative code for Nassau county in harmony with and supplemental to the county government law of Nassau county," as last amended by chapter eight hundred and forty-five of the laws of nineteen hundred thirty-nine, is hereby amended to read as follows:

§ 5-23.0 **Return by receiver of taxes.** a. The town receiver of taxes shall make his return of unpaid taxes, excepting school district taxes, to the county treasurer on or before the first day of October of the [1]calendar year following the delivery to him of his warrant. The town receiver of taxes shall make his return of unpaid school district taxes to the county treasurer on or before the first day of June of the [2]calendar year following the delivery to him of his warrant.

§ 2. This act shall take effect immediately.

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[1] Word "second" omitted.

[2] Word "second" omitted.

Chapter 679

An Act to amend the Nassau county administrative code so as to reduce the period of redemption on tax liens from four years to two years

Became a law April 22, 1941, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

L. 1939, ch. 272, § 5-30.0, subd. b, amended.

Section 1. Subdivision b of section 5-39.0 of chapter two hundred and seventy-two of the laws of nineteen hundred thirty-nine, entitled "An act to provide an administrative code for Nassau county in harmony with and supplemental to the county government law of Nassau county," is hereby amended to read as follows:

b. The rate of interest and penalty at which any person or persons purchase the tax lien shall be established by his bid. The rate thus established shall be the rate of interest and penalty for a period of two[1] years from the date of such sale or if the lien is discharged prior to such time, then up to the time of such discharge.

§ 5-40.0 amended.

§ 2. Section 5-40.0 of such chapter is hereby amended to read as follows:

§ 5-40.0 **Interest on tax lien; how computed.** The maximum interest and penalties which a tax lien may carry and bear are the following:

1. If satisfied within six months of the date of sale, ten per centum on the purchase price.

2. If satisfied after the expiration of six months and within twelve months of the date of sale, an additional ten per centum on the purchase price.

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[1] Word "two" substituted for word "four".

3. If satisfied after the expiration of twelve months and within a period of eighteen months of the date of sale, an additional ten per centum on the purchase price.

4. If satisfied after the expiration of eighteen months and within a period of twenty-four months of the date of sale, an additional ten per centum on the purchase price.[2] However, if the rate of interest at which the tax lien was purchased is less than the maximum interest rate, the tax lien shall carry and bear such lower interest rate.

§ 5-48.0, amended.

§ 3. Section 5-48.0 of such chapter is hereby amended to read as follows:

§ 5-48.0 **Rights of purchasers.** There shall be due and payable to a holder of a tax lien twenty-four [3] months from the date of sale of such lien:

1. The amount paid for the lien.

2. The interest and penalty thereon at the rate for which he purchased the lien.

3. The costs and expenses which have accrued against the property affected by the lien, as provided in this article.

§ 5-51.0, subd. b, amended.

§ 4. Subdivision b of section 5-51.0 of such chapter as amended by chapter seven hundred and four of the laws of nineteen hundred thirty-nine is hereby amended to read as follows:

b. Such notice may be given at any time after the expiration of twenty-one [4] months from the date of the sale of the tax lien. Such notice shall either be printed or written or partly written and partly printed, and shall state briefly:

1. The lot or lots or parcel or parcels of land affected by the tax lien.

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[2] Former paragraphs 5, 6, 7, and 8 omitted.
[3] Word "twenty-four" substituted for word "forty-eight".
[4] Word "twenty-one" substituted for word "forty-five".

2. The year of the tax for which the tax lien was sold.

3. The expense of making searches thereon and serving the notice.

4. The last day of satisfaction of the tax lien, which day shall not be less than three months from the day of service of the same.

Such notice shall further state that the satisfaction is to be made at the office of the county treasurer at Mineola, and that in the event that such tax lien shall not be satisfied within the time stated in such notice, the holder shall elect to accept a deed of conveyance of such property or to call his money and foreclose his tax lien, as the case may be.

§ 5-60.0, amended.

§ 5. Section 5-60.0 of such chapter is hereby amended to read as follows:

§ 5-60.0 **When foreclosure action may be commenced.** The action provided for in section 5-58.0 of the code may be commenced at any time after twenty-four [5] months from the date of sale mentioned in the certificate of sale. All the provisions of the civil practice act and all other provisions of law and the rules of practice relating to actions for the foreclosure of mortgages shall apply to the action hereby authorized so far as applicable, except as otherwise provided in this article. It shall be sufficient for the plaintiff to set forth in his complaint in such action:

1. A copy of or the substance of his certificate of sale of the tax lien, and the amount of interest, penalties, additions and expenses claimed by him.

2. A statement that the tax lien has not been satisfied pursuant to section 5-50.0 of the code or that the real property affected by such tax lien has not been conveyed pursuant to section 5-53.0 of the code.

3. A statement that the plaintiff elects to recover the amount of the tax lien and the interest, penalties, additions and expenses thereon.

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[5] Word "twenty-four" substituted for word "forty-eight".

4. A statement that the defendants have or may have some interest in or lien upon the property affected by the action.

§ 6. All rights and remedies provided for the enforcement of tax liens and the redemption of real property affected by a tax lien sold at a sale of tax liens held prior to the first day of April, nineteen hundred forty-one shall continue in respect of such tax liens and such real property in the same manner as though this chapter had not been enacted.

§ 7. This act shall take effect immediately.

LAWS OF NEW YORK, 1939

CHAPTER 272

ARTICLE 2

ENFORCEMENT OF COLLECTION OF TAXES BY COUNTY TREASURER

§ 5-24.0 **Definitions.** As used in this article:

1. The term "tax" when used alone or as a part of another term, unless the context requires otherwise, includes taxes and assessments for benefit levied by or for school or special districts, towns, the county or the state, other than those assessments for benefit levied pursuant to title B of chapter eleven of the code.

2. The term "assessment" or "assessment for benefit" unless the context requires otherwise, means an assessment for benefit levied by the county pursuant to title B of chapter eleven of the code.

3. The term "tax lien" includes:

(a) The right of the county to collect taxes, penalties, interest and other charges on the real property affected by such taxes for failure to pay such taxes, and

(b) The lien against such real property for all the aforementioned items.

4. The term "sale of taxes" or "sale of a tax lien" includes the sale of the real property affected by such tax lien.

5. The term "certificate of sale" or "certificate of sale of a tax lien" means the instrument by which the county transfers a tax lien and sells the real property affected by such tax lien.

6. The term "holder," "holder of a tax lien" or "holder of a certificate of sale of a tax lien" means the purchaser of a tax lien and of the real property affected by such tax lien or if the purchaser has transferred the certificate of sale, a person in lawful possession of such certificate of sale who claims title through the purchaser of such certificate of sale. The term "person" as used in this definition includes the county.

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§ 5-41.0 **Deposit; contents of certificate of sale of tax lien.** Each purchaser at a sale of tax liens shall pay to the county treasurer ten per centum of the amount of the tax lien immediately after such sale, and the remaining ninety per centum of such tax lien within sixty days after such sale. Thereupon the county treasurer shall execute to each purchaser, including the county, a certificate in writing which shall contain:

1. A description of the real property affected by the tax lien which description shall refer to the designation of such property on the tax map, if such map has been completed.

2. The name of the owner of the real property as it appears on the tax books.

3. The interest and penalty at which such tax lien was purchased.

4. The date of the sale.

5. A statement that the tax lien was sold for unpaid school district, special district, town, county or state taxes, as the case may be.

6. The amount paid for the tax lien.

7. Such other information as the county treasurer shall deem expedient.

* * * * * * *

§ 5-48.0 **Rights of purchasers.** There shall be due and payable to a holder of a tax lien forty-eight months from the date of sale of such lien:

1. The amount paid for the lien.

2. The interest and penalty thereon at the rate for which he purchased the lien.

3. The costs and expenses which have accrued against the property affected by the lien, as provided in this article.

§ 5-49.0 **Payment by holder of certificate of sale; penalties thereon.** a. The holder of a certificate of sale of tax liens, at any time after the annual return of taxes to the county treasurer by the receiver of taxes, may pay to the county treasurer any taxes on such return and any older taxes that are a lien on such property.

b. The holder of such certificate making payment of such taxes shall be entitled to and shall receive the full amount of the taxes thus paid with interest and penalties thereon from the date of payment at the same rate and payable in the same manner as the interest and penalties at which he purchased such tax lien.

c. The taxes, so paid by the holder of the certificate of sale of the tax lien, with the interest and penalty at the rate at which the tax lien was purchased, shall become a lien on the property and shall be payable at the time of the discharge of the certificate of sale of the tax lien or at the time of completion of foreclosure proceedings out of the proceeds realized at such sale of the property.

§ 5-50.0 **When tax lien may be discharged.** a. The owner of, or any person interested in, or having a lien upon any real estate on which the tax lien has been sold, may satisfy the same, at any time before the delivery of the county treasurer's deed or the sale in an action to foreclose the tax lien, * * *

b. The county treasurer shall continue to receive and allow satisfactions of the tax lien in the manner set forth in subdivision a of this section and on the terms provided

until the delivery of the county treasurer's deed or until a notice of election to foreclose the tax lien is filed with him by the holder thereof together with proof by affidavit or certificate that a summons, complaint and notice of pendency of action in an action to foreclose the lien shall have been duly filed in the office of the county clerk. The county treasurer shall not thereafter allow satisfactions or receive payments therefor except on order of the court duly made in the action. * * *

§ 5-51.0 **Notice to owner by holder.** a. The holder of any tax lien which is not satisfied, shall give notice to the occupant, owner in fee, trustee, mortgage, judgment creditor or purchaser at any other county tax sale of a tax lien affecting the same property, and the heirs, legal representatives, and assigns of any or other of them, the guardian of any infants having any interest therein, and any other person having a lien, claim or interest appearing of record on the premises affected by such sale. * * *

b. Such notice may be given at any time after the expiration of forty-five months from the date of the sale of the tax lien. Such notice shall either be printed or written or partly written and partly printed, and shall state briefly:

1. The lot or lots or parcel or parcels of land affected by the tax lien.

2. The year of the tax for which the tax lien was sold.

3. The expense of making searches thereon and serving the notice.

4. The last day of satisfaction of the tax lien, which day shall not be less than three months from the day of service of the same.

Such notice shall further state that the satisfaction is to be made at the office of the county treasurer at Mineola, and that in the event that such tax lien shall not be satisfied within the time stated in such notice, the holder shall elect to accept a deed of conveyance of such property or to call his money and foreclose his tax lien, as the case may be. * * *

§ 5-52.0. **Possession of real estate affected by tax liens; when obtained by holder.** a. In the event that the tax lien has not been satisfied as provided in section 5-50.0 of the code, the holder of the tax lien may obtain actual possession of the premises after:

1. The time limitations in sections 5-50.0 and 5-51.0 of the code for the discharge of such tax lien have expired.
2. Notice has been given pursuant to section 5-51.0 of the code.
3. Title to such premises has been conveyed to him pursuant to this article.

b. Such actual possession may be obtained by an action at law or by causing the occupant of such real estate to be removed therefrom, and the possession thereof to be delivered to the holder of the tax lien in the same manner, and in the same proceedings, and before the same officers as in the case of a tenant holding over after the expiration of his term without the permission of his landlord.

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§ 5-53.0 **Conveyance by the county when tax lien is not satisfied.** If such tax lien is not satisfied, the county treasurer shall execute to the holder of such certificate of sale of the tax lien a conveyance of the real estate on which the tax lien has been sold. This conveyance shall vest in the grantee an absolute estate in fee, subject to all claims which the county may have thereon for tax or other liens or incumbrances. Such conveyance shall be executed only upon:

1. Performance by such purchaser of the conditions which he is required to perform pursuant to this article.
2. Surrender of such certificate of sale.
3. The taking and paying for by the holder of an assignment of all outstanding prio tax liens held by the county upon the premises.
4. The filing of prof of service of notice upon owners and other interested persons as provided by section 5-51.0 of the code.

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§ 5-60.0 **When foreclosure action may be commenced.** The action provided for in section 5-58.0 of the code may be commenced at any time after forty-eight months from the date of sale mentioned in the certificate of sale. All the provisions of the civil practice act and all other provisions of law and the rules of practice relating to actions for the foreclosure of mortgages shall apply to the action hereby authorized so far as applicable, except as otherwise provided in this article. It shall be sufficient for the plaintiff to set forth in his complaint in such action:

1. A copy of or the substance of his certificate of sale of the tax lien, and the amount of interest, penalties, additions and expenses claimed by him.
2. A statement that the tax lien has not been satisfied pursuant to section 5-50.0 of the code or that the real property affected by such tax lien has not been conveyed pursuant to section 5-30.0 of the code.
3. A statement that the plaintiff elects to recover the amount of the tax lien and the interest, penalties, additions and expenses thereon.
4. A statement that the defendants have or may have some interest in or lien upon the property affected by the action.

* * * * * * *

§ 5-64.0 **Conveyance vests absolute fee in purchaser.** a. The conveyance made pursuant to a judgment in any such action shall vest in the purchaser all right, title, interest, estate, claim, lien and equity of redemption in and against the premises sold:

1. Of all the parties to the action;
2. Of each person claiming from, through or under such parties by title accruing after the filing of notice of pendency of the action; or
3. Of persons whose conveyance or incumbrance is subsequent or is subsequently recorded.

b. All such parties and persons shall be barred and forever foreclosed by the judgment in such action of all right,

title, interest, estate, claim, lien and equity of redemption in and to the premises sold, or any part thereof. The judgment in any such action may direct the cancellation or satisfaction of record of taxes, assessments or other claims of any of the parties to the action.

c. Such conveyance shall not affect:

1. Subsequent taxes and assessments, and sales on account thereof, and

2. Taxes and assessments which were liens on the premises at the time of the filing of a notice of pendency of the action, but for the nonpayment of which no sale had been had prior thereto, and any sale on account of such taxes and assessments.

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End